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OF WEST VIRIGINIA

NO. 33034

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA,

Appellee,

v.

NORMA JEAN SAUNDERS,

Appellant.

BRIEF OF APPELLEE STATE OF WEST VIRGINIA

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MISCELLANEOUS

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I.

KIND OF PROCEEDING AND NATURE OF THE RULING BELOW

This is an appeal by Norma Jean Saunders, hereinafter Appellant, from her conviction in the Circuit Court of Kanawha County of one felony count charging violation of a "cease and desist" order in August, 2002.[1] By Order entered June 10, 2005, the circuit court sentenced Appellant to six (6) months probation and a $250.00 fine.

On appeal, Appellant alleges two assignments of error: that the circuit court erred in denying her motion to dismiss on the ground that the indictment failed to allege a prior conviction; and that the statute at issue is unconstitutionally vague and therefore violates her due process rights.

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[1]The Appellant had been charged with three felony counts charging violations in August, October and December, 2002, respectively. As part of the plea agreement whereby Appellant pleaded guilty to Count One, the other counts were dismissed.

II.

STATEMENT OF THE FACTS

For the purposes of this appeal, the facts of the case are undisputed and therefore will not be recited. The Appellant entered a conditional guilty plea, thereby admitting that the evidence was sufficient to support a felony conviction in these proceedings. (R: 35).

III.

ASSIGNMENTS OF ERROR

Appellant assigns the following grounds as error:

1. The Circuit Court erred in denying the defendant's motion to dismiss because the indictment failed to allege an essential element of the felony offense. The indictment charged Norma Jean Saunders who has no prior convictions with violating W.Va. Code § 22-15-15(b)(4), an enhancement statute, that requires a prerequisite conviction before a felony can be imposed.

2. West Virginia Code § 22-15-15(b)(4) is unconstitutionally vague and therefore in violation of the Due Process clauses of Article III, Section 10 of the Constitution of West Virginia and the Fourteenth Amendment of the United States Constitution.

(Appellant's Brief at 3.)

IV.

ARGUMENT

A. THE CIRCUIT COURT PROPERLY INTERPRETED AND APPLIED WEST VIRGINIA CODE § 22-15-15(b)(4).

West Virginia Code § 22-15-15(b)(4) states that "[a]ny person convicted of a second offense or subsequent willful violation of subdivision (2) or (3) of this subsection **or** knowingly and willfully violating any provision of any permit, rule or order issued under or subject to the provision of this article **or** knowingly and willfully violating any provision of this article, is guilty of a felony. . .[.]"

(Emphasis added.) Appellant contends that the state failed to allege an essential element of the felony charge against her because the indictment charged her with violating § 22-15-15(b)(4) and she has no prior convictions under the statute.

The statutory provision at issue is written in the disjunctive, and "where the disjunctive 'or' is used, it ordinarily connotes an alternative between the two [or more] clauses that it connects." *State v. Taylor*, 176 W.Va. 671, 675, 346 S.E.2d 822, 825 (1986)(citations omitted). Read in harmony with this rule of statutory construction, § 22-15-15(b)(4) sets out three distinct fact patterns which may underlay a felony: first, where the actor has a prior conviction under the statute; second, where the actor commits a knowing and willful violation of a permit, rule or order; and third, where the actor commits a knowing and willful violation of the statute. There is nothing unusual or suspect about statutes written in the disjunctive; in fact, it has long been the law that ". . . the use of the disjunctive is fatal only where uncertainty results, and not where one term is used as explaining or illustrating the other, or where the language of the statute makes either an attempt or procurement of an act, or the act itself in the *alternative*, indictable." *State v. Loy*, 146 W. Va. 308, 313, 119 S.E.2d 826, 830 (1961) (emphasis added).

Appellant's indictment alleged that she:

> Unlawfully, feloniously, *knowingly, and willfully violate[d] a cease and desist order* of the West Virginia Department of Environmental Protection issued on the 28th day of August, 2002, pursuant to the Consent Order of the West Virginia Environmental Quality Board issued on the 9th day of August, 2001, in the matter of Rick's Used Auto Parts v. Ken Ellison, Director, Division of Waste Management, Department of Environmental Protection, in violation of Chapter 22, Article 15, Section 15(b)(4)...

(R: 2-3) (emphasis added).

The allegations in the indictment specifically addressed the second circumstance constituting a felony under this statute, to-wit, "knowingly and willfully violating any provision of any permit, rule or order issued under or subject to the provision of this article." W. Va. Code § 22-15-15(b)(4). These allegations were clear, unambiguous and consistent with the statutory language. Therefore, the trial court correctly dismissed Appellant's motion to dismiss on the ground that a prior conviction was merely one of three separate bases on which an indictment under the statute may be charged.

Appellant also argues that her conduct could be charged only under the misdemeanor subsection of the Solid Waste Management Act, W. Va. Code § 22-15-15(b)(3), because there is "no real distinction between the terms 'knowingly' and 'willfully'" (Appellant's Brief at 6), the former being the required mental element for a felony conviction and the latter for a misdemeanor conviction. In this regard, Subsection (b)(3) of the statute provides that "[a]ny person who willfully or negligently violates any provision of any permit issued under or subject to the provisions of this article or who *willfully or negligently* violates any provision of this article or any rule of the secretary or any order of the secretary or board is guilty of a misdemeanor. . .," while Subsection (b)(4) penalizes "[u]nlawful[], felonious[], knowing[], and willful[]" conduct.

Black's Law Dictionary defines "knowing," the mental element distinguishing a felony from a misdemeanor, as "1. [h]aving or showing awareness or understanding; well-informed[;] 2. [d]eliberate; conscious." (8th ed. 2004). In short, one acts knowingly when he or she is aware, informed and conscious that his or her actions are in violation of the statute or an order. In this case, the record contains ample evidence that Appellant was aware, informed and conscious of the cease and desist orders she violated; therefore, a jury could reasonably find that she "knowingly" violated them. Appellant was contacted on August 16, 2002 regarding the deficiencies at her landfill, on

August 28, 2002 regarding closure via cease and desist letter, and on October 29, 2002 regarding a cease and desist Order. Further, Appellant had met with Michael Zeto, WV-DEP, who told her with counsel present that "[she was] closed." (R: 7-R - 7-S.) WV-DEP Inspector Richard Hackley informed Appellant that her continued acceptance of waste materials could be viewed as a criminal matter. (R: 7-Q.) Additionally, Appellant sent a cease and desist letter to a Brenda Watton, instructing Ms. Watton to "cease and desist from any and all intervention of Rick's Used Auto Parts' clients immediately." (R: 7-PP.)

From all of this evidence it may be inferred – and indeed, it is clear – that Appellant had knowledge of the nature and existence of the cease and desist order she violated. She had knowledge that her continued activities violated several orders and could lead to criminal charges.

"Willful" is defined as "voluntary and intentional, but not necessarily malicious." *Blacks Law Dictionary* (8th ed. 2004). The United States Court of Appeals for the Fourth Circuit has held that in considering willfulness, a jury should consider whether the defendant "deliberately closed [her] eyes to what otherwise would have been obvious to [her]." *United States v. Hitzig*, 63 Fed.Appx. 83 (4th Cir. 2003). The Fourth Circuit also upheld a jury instruction defining willfully as "voluntarily and purposely," reiterating the *Blacks* intent formulation. *United States v. Velez*, 27 Fed.Appx. 179, 182 (4th Cir. Nov. 20, 2001). In other words, a person acts "willfully" when he or she intends to commit an act.

In this case, Appellant's acceptance of money in exchange for permitting scrap to be dumped on her lot shows intent, i.e., willfulness. Appellant was warned by the DEP on several occasions to stop receiving waste at her facility, and she voluntarily and intentionally disregarded those warnings. Further, she was video-taped accepting payment for her acceptance of scrap. (R:7Z - 7BB.) When

asked if her landfill was open, she answered in the affirmative and continued to accept money for disposal of scrap at what was supposed to be a closed landfill. (R: 7EE - 7FF.)

Appellant's argument is further flawed by her failure to note that the misdemeanor requires the act to be committed either "willfully **or** negligently," while the felony requires the act to be committed both "knowingly **and** willfully." A close reading of the statute suggests that the Legislature intended the different words and formulations in the misdemeanor and felony subsections of the statute to distinguish the misdemeanor offense from the felony offense.

> An interpretation of a statute or a clause thereof which gives it no function to perform, and makes it a mere repetition of another clause, must be rejected as unsound; for it is a presumed that the Legislature had a purpose in the use of every word and clause found in a statute, and intended the terms used to be effective.

Ex parte Watson, 82 W. Va. 201, 95 S.E. 648 (1918) (citations omitted). "A cardinal rule of statutory construction is that significance and effect must if possible, be given to every section, clause, word or part of a statute," *State ex rel. City of Huntington v. Lombardo*, 149 W. Va. 671, 698, 143 S.E.2d 535, 551 (1965); therefore, each word in this statute, including "knowingly" in the felony provision, has meaning.

In summation, in drafting the Solid Waste Management Act, the Legislature intended for the terms "willfully" and "knowingly" to have their own separate and distinct meanings for the purposes of the misdemeanor and felony charges. The longstanding precedent in West Virginia is that "every word in [a] statute [has] purpose and effect." *Ex parte Watson, supra*, at 650. As noted, the statutory misdemeanor provision requires **either** negligence **or** intent to dump waste, while the felony provision requires **both** an intent to dump waste **and** the conscious awareness that the actor is violating the statute or an order. In this case, Appellants' actions were in violations of several orders

and met the statutory requirements for a felony conviction. There was no error in the lower court's interpretation of the W. Va. Code § 22-15-15(b)(4) or its application to this case.

B. WEST VIRGINIA CODE § 22-15-15(b)(4) PLAINLY AND CLEARLY ESTABLISHES THE ELEMENTS OF THE OFFENSE AND THE CRIMINAL PENALTIES THAT MAY BE IMPOSED; THEREFORE THE STATUTE IS CONSTITUTIONAL.

Appellant contends that the statute violates her due process rights because W. Va. Code § 22-15-15(b)(4) is unconstitutionally vague, being without express standards or guidelines for law enforcement and therefore amenable to a prosecutor's arbitrary decision to charge any violation under the article as either a felony or a misdemeanor.

"When the constitutionality of a statute is questioned every reasonable construction of the statute must be resorted to by a court in order to sustain constitutionality, and any doubt must be resolved in favor of the constitutionality of the legislative enactment." Syl. pt. 4, *State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974)(citing Syl. pt. 3, *Willis v. O'Brien*, 151 W. Va. 628, 153 S.E.2d 178 (1967)).

Appellant's legal argument is sound in a vacuum, but it is completely irrelevant to the statute in question. Without doubt, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment[,] but also the severity of the penalty that a State may impose." *State v. Easton*, 203 W. Va 631, 640-641, 510 S.E.2d 465, 474-475 (1998)(quoting *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 1598, 134 L.Ed.2d 809, 826 (1996)(footnote omitted)).

This Court has said that:

> [w]hile [t]here is no satisfactory formula to decide if a statute is so vague as to violate the due process clauses of the State and Federal Constitutions[,] [t]he basic

> requirements are that such a statute must be couched in such language so as to notify a potential offender of a criminal provision as to what he should avoid doing in order to ascertain if he has violated the offense provided and it may be couched in general language.

State v. Easton, 203 W. Va. 631, 641, 510 S.E.2d 465, 475 (1998)(citing Syl. pt. 1, *State ex rel. Myers v. Wood*, 154 W. Va. 431, 175 S.E.2d 637 (1970)).

The statute at issue, W. Va. Code § 22-15-15(b)(4), states:

> Any person convicted of a second offense or subsequent willful violation of subdivisions (2) or (3) of this subsection **or** knowingly and willfully violating any provision of any permit, rule or order issued under or subject to the provisions of this article **or** knowingly and willfully violating any provision of this article, is guilty of a felony and, upon conviction thereof, shall be imprisoned in a state correctional facility not less than one nor more than three years, or fined not more than fifty thousand dollars for each day of violation, or both fined and imprisoned.

(Emphasis added.)

This language comports with the requirement that "[a] criminal statute must be set out with sufficient definiteness to give a person of ordinary intelligence fair notice that his contemplated conduct is prohibited by statute and to provide adequate standards for adjudication." Syl. pt. 1,*State v. Flinn*, 158 W. Va. 111, 208 S.E.2d 538 (1974). Subsection (b)(4) clearly outlines the three circumstances constituting a felony violation under the Solid Waste Management Act: first, where the defendant has a prior conviction under the statute; second, where the defendant commits a knowing and willful violation of a permit, rule or order; and third, where the defendant commits a knowing and willful violation of the statute. There is nothing unclear or uncertain, let alone constitutionally vague, about what the statute prohibits.

Furthermore, as to constitutionally sufficient notice of the possible penalty for a violation of the statute, W. Va. Code § 22-15-15(b)(4) provides that upon conviction, the defendant can be

imprisoned for not less than one year nor more than three years; can be fined not more than fifty thousand dollars for each day of violation; and can be both fined and imprisoned. It is readily apparent that the language set forth in the Solid Waste Management Act "plainly and clearly establishes the possible criminal penalties that may be imposed for the commission of conduct prohibited." *State v. Easton*, 203 W. Va. at 641, 510 S.E.2d at 476.

The language of W. Va. Code § 22-15-15(b)(4) satisfies the "dual notice requirements" of law, to-wit, "notice of both the proscribed conduct and the possible penalties that may be imposed therefor." *Id.* Therefore, the statute is neither unconstitutionally vague nor in violation of the Due Process Clause of Article III, Section 10 of the Constitution of West Virginia and the Fourteenth Amendment of the United States Constitution.

C. THE COURT SHOULD NOT CONSIDER THIS ISSUE, BECAUSE THIS CASE DOES NOT FALL WITHIN AN EXCEPTION TO THE GENERAL RULE AGAINST RAISING CLAIMS FOR THE FIRST TIME ON APPEAL.

On appeal, the Appellant claims for the first time that West Virginia Code § 22-15-15(b)(4) is unconstitutionally vague. This issue was never raised at any stage during the proceedings below, and is therefore not properly before this Court; the only issue raised below whether or not a prior conviction under §22-15-15 was required to constitute a felony. (R: 4-I; 17; 21; 67.)

"[I]f any principle is settled in this jurisdiction, it is that, absent the most extraordinary circumstances, legal theories not raised properly in the lower court cannot be broached for the first time on appeal." *State v. Miller*, 197 W. Va. 588, 597, 476 S.E.2d 535, 544 (1996). "Our general rule in this regard is that, when nonjurisdictional questions have not been decided at the trial court level and are then first raised before this Court, they will not be considered on appeal." *Whitlow v. Board of Education of Kanawha County*, 190 W. Va. 223, 226, 438 S.E.2d 15, 18 (1993) (citations omitted).

Furthermore, "[a]s a general matter, a defendant may not assign as error, for the first time on direct appeal, an issue that could have been presented initially for review by the trial court on a post-trial motion." Syl. pt. 2, *State v. Salmons*, 203 W. Va. 561, 509 S.E.2d 842 (1998).

In the above-cited authorities, this Court has emphasized that before an issue may be properly addressed on appeal, the circuit court must first be given an opportunity to apply controlling legal principles to the facts presented. By failing to present her constitutional argument below, the Appellant deprived the circuit court of that important opportunity. The Appellant has not explained why she failed to present her constitutional challenge to the statute in the trial court.

The State recognizes that this Court may, in the interest of justice, apply the plain error doctrine *sua sponte* to review unpreserved errors when important constitutional rights are at stake. *See, e.g., Salmons, supra*, at 571 n.13, 509 S.E.2d at 852 n.13; *State v. Harris*, 189 W. Va. 423, 427 n.1, 432 S.E.2d 93, 98 n.1 (1993). However, "the doctrine is to be used sparingly and only in those circumstances where substantial rights are affected, or the truth-finding process is substantially impaired, or a miscarriage of justice would otherwise result." Syl. pt. 4, in part, *State v. England*, 180 W. Va. 342, 376 S.E.2d 548 (1988); *State v. Myers*, 204 W. Va. 449, 456, 513 S.E.2d 676, 683 (1998).

This Court recently held that "[a] constitutional issue that was not properly preserved at the trial court level may, in the discretion of this Court, be addressed on appeal when the constitutional issue is the controlling issue in the resolution of the case." Syl. pt. 2, *Louk v. Cormier*, 218 W. Va. 81, 622 S.E.2d 788 (2005). Additionally, "[c]ourts will not pass on the constitutionality of a statute unless it is absolutely necessary for the determination of the case." *Kolvek v. Napple*, 158 W. Va. 568, 574, 212 S.E.2d 614, 618 (1975). In the case at bar, however, Appellant has failed to present

any compelling reason for this Court to consider her constitutional claims that were not raised in the proceedings below. Accordingly, the Court should decline to address this issue.

V.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgment of the Circuit Court of Kanawha County should be affirmed by this Honorable Court.

Respectfully Submitted,

STATE OF WEST VIRGINIA,
Appellee,

By counsel,

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CERTIFICATE OF SERVICE

I, Barbara H. Allen, Managing Deputy Attorney General, hereby certify that a copy of the within "Brief of Appellee State of West Virginia" was served upon Appellant by first class mail addressed to her counsel as set forth hereinafter, on this the 15th day of June, 2006:

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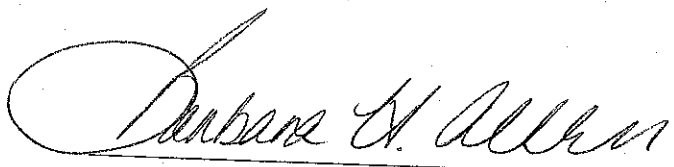

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